Supreme Court, U. S.
FILED
MAY 19 1980
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1644

LLOYD F. and ELOISE L. CANFIELD,

Petitioners,

-against-

THE CITY OF NEW YORK,

Respondent.

APPENDIX TO BRIEF OPPOSING WRIT OF CERTIORARI

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May 15, 1980

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APPENDIX I

THE 1931 APPORTIONMENT - NEW JERSEY v. NEW YORK, 283 U.S. 336 (1931).

(1)

In May of 1979, the State of New Jersey invoked this Court's original jurisdiction to enjoin the State of New York from proceeding with a planned diversion to the Hudson River watershed of 600 million gallons daily (mgd) from 5 New York streams tributary to the Delaware River (East Branch, Neversink River, Beaver Kill, Willowemoc, Little Delaware) to supply water to the City of New York (Special Master's Report [SM], pp. 5-7, 83). A Special Master (Charles Burch) was thereupon appointed to take testimony, make findings of fact and conclusions of law, as well as recommendations for a decree, and Pennsylvania was granted leave to

intervene (SM 1, 5). New Jersey v. New York, 280 U.S. 528, 533 (1930).*

In a report confirmed by this Court and described as "most competent and excellent" (283 U.S. at 343, 346), the Special Master noted that New York's planned diversion had been embodied in a compact recommended by a joint commission of the States bordering the Delaware, but had been denied ratification by the legislatures of New Jersey and Pennsylvania (SM 10-11, 39). He reported further that Trenton and other cities in New Jersey "take water for municipal and domestic purposes from the Delaware River"; that "Philadelphia takes 60% of its supply from the Delaware River"; that an upstream riparian's right to a reasonable share of the flow is recognized in all three States;

*The Special Master's report, as well as the entire record in that proceeding, were received at the joint trial herein as Ex. AY.

and that their public policy is to permit diversions from one watershed to another (SM 24, 35-37, 125-6).*

The Special Master then set forth New York's position that in seeking a share of its own waters for similar municipal and domestic purposes, it is reasonable to impound runoffs in the Spring "at high or flood stages" of the river, and make compensating releases thereto during the dry

*The Special Master described the Delaware as a river that "rises in the western slopes of the Catskill Mountains in the State of New York. There are two branches of the river, one known as the West Branch and one known as the East Branch," which "unite at Hancock, N.Y. and form the Delaware River proper. From Hancock the river flows in a southeasterly direction for a distance of approximately 75 miles to Tri-State Rock (Port Jervis, N.Y.) where it enters the State of New Jersey", that 75-mile stretch of the river forming the boundary between New York and Pennsylvania (SM 10-11, 39, 53-54). It then continues southerly 120 miles to Trenton, and an additional 92 miles "in a southerly direction as a tidal stream to Delaware Bay" (ibid).

summer and fall months when the river was "at a low stage" (SM 61).

New Jersey's opposing view was similarly set forth - to the effect that the proposed diversion would deprive New Jersey "and its citizens as riparian owners along the Delaware River of the natural, unobstructed and undiminished flow of its waters in violation of their rights under the common-law"; would increase "salinity of the water in the lower part of the Delaware River," thereby endangering "the municipal water supply of towns and cities in New Jersey"; and would adversely affect "use of the river for recreational purposes" (SM 8-9, 181-2).

The report then detailed Pennsylvania's position - that the doctrine of equitable apportionment should be applied to the waters of the Delaware and that the proposed

diversion of 600 mgd does not exceed New York's "fair and equitable share in the waters of the upper Delaware River and will not cause any substantial damages to its interests, if taken pursuant to the Pennsylvania plan of impounding and release," pursuant to which releases would be made from the City's impounding reservoirs "whenever the river drops to a low stage at either Port Jervis or at Trenton" (SM 67-69, 169, 183, 192). Pennsylvania also requested that Philadelphia and Eastern Pennsylvania "should be presently allotted 750 mgd from the Pennsylvania tributaries of the upper Delaware River as their fair and equitable share in the waters of that river," and that a River Master be appointed to regulate river flow (SM 183-186).

(2)

The Special Master concluded that "the doctrine of equitable apportionment announced in Wyoming v. Colorado (259 U.S. 419, 465) is one of general application regardless of whether the contesting states recognize the strict common law rule of riparian rights or some other rule of law"; that New York may not claim a "monopoly of the stream" as the upstream State, nor may New Jersey insist that "all the water of the Delaware originating in New York State shall flow into New Jersey totally undiminished"; and that the Supreme Court will determine whether a proposed diversion would "result in a state receiving more than its just share of the benefits of the stream" (SM 28, 32-33, 37). Reviewing the record proof as to the injurious effects of the proposed diversion upon the

river's sanitation, fishing, recreational, agricultural and industrial uses, the Special Master held that "the modification herein made of the New York Plan of diversion" would eliminate any possible claim of injury (SM 182, 125-6, 138, 146, 151, 158-9, 176, 207-8).

That modification consisted of reducing the planned diversion of 600 mgd from five New York tributaries to 440 mgd from two of them (East Branch and Neversink River) - "The taking of the equivalent of 440 mgd does not exceed New York's fair share under the doctrine of equitable apportionment," the "prayer of the Pennsylvania intervention for the application of the doctrine of equitable apportionment" being approved; requiring New York to adhere to the "Pennsylvania plan of release" which fixed 1535 cubic feet per second (cfs) at

Port Jervis and 3400 cfs at Trenton (998 mgd and 2210 mgd, respectively) as the minimum flow at those points; and requiring New York to erect a sewage treatment plant at Port Jervis to assure the downstream States a clean flow of water (SM 191, 195-6, 206-7, 125-6). Pennsylvania's requests for an allocation of 750 mgd and appointment of a River Master were both denied, without prejudice, as premature (SM 190-1, 211).

(3)

In confirming the Special Master's Report, this Court embodied all of his recommendations in its decree, including that restraining New York "from diverting water in excess" of 440 mgd (283 U.S. 336, 346-8, 305). The decree effectively required the City to erect oversize reservoirs with a storage capacity 45% greater than necessary to impound water for City use, so that com-

pensating releases could be made therefrom to assure a higher stage of the river during the dry season at Port Jervis and Trenton (283 U.S. at 346, 806).

The unanimous decision (Holmes, J.) rejected New Jersey's insistence "on a strict application of the common law governing private riparian proprietors subject to the same sovereign power," as well as its position that the recommended diversion would deprive "its citizens who are riparian owners of the undiminished flow of the stream" without compensation (283 U.S. at 342-344). It was there held that "a more liberal answer may be given" in controversies between States over their interstate waters than may be appropriate in a controversy between riparians in a single State because - "Different considerations come in when we are dealing

with independent sovereigns having to regard the welfare of the entire population" (ibid). Pointing out that a river "is more than an amenity, it is a treasure * * * that must be rationed among those who have power over it," this Court adopted and applied "the principle of equitable apportionment" (283 U.S. at 342-3). Since "possible experiences of the future may make modifications of the plan as it now stands necessary in unforeseen particulars," the decree provided for retention of jurisdiction "for the purpose of any order or direction or modification of this decree, or any supplemental decree that it may deem at any time to be proper" (283 U.S. at 344, 348).

APPENDIX II

THE 1954 APPORTIONMENT - NEW JERSEY v. NEW YORK, 347 U.S. 941, 995 (1954)

(1)

Due to the depression of the 1930's and the ensuing war conditions, it was not until the late 1940's that construction was commenced on the two reservoirs for impounding waters of the East Branch (Pepacton) and Neversink River (Neversink) authorized by the 1931 Decree.

"On April 1, 1952, the City of New York with the approval and support of the State of New York, moved under paragraph 6 of the 1931 decree for leave to file its petition to modify the decree by providing for diversion of additional quantities of water" from New York's other main tributary to the Delaware (the West Branch), "and for changes in

the prescribed formula for releasing water during low flow. The motion was granted. 343 U.S. 974. New Jersey and Pennsylvania filed answers opposing the proposed modifications, and the whole matter was referred to a Special Master." New Jersey v. New York, 345 U.S. 369, 371 (1953).

The State of Delaware was permitted to intervene (347 U.S. 941 [1954]), but Philadelphia's attempt to do so was rejected. This Court pointed out that under the parens patriae doctrine, Pennsylvania "when a party to a suit involving a matter of sovereign interest, 'must be deemed to represent all its citizens.' (citing cases)." 345 U.S. 369, 372 (1953). It was also there noted that Pennsylvania was an active party, had strongly opposed New Jersey's

position based on common-law riparian rights "since that proposition threatened the right of Philadelphia and Eastern Pennsylvania to continue their use and development of the Delaware River," and that Pennsylvania now opposed any additional diversion "not justified under the doctrine of equitable apportionment" (345 U.S. at p. 374).

(2)

In his Report to this Court of May 27, 1954, the Special Master (Kurt F. Panzer) noted the basic principles of law established in the prior proceeding "of controlling importance in the present case," namely - "that the interstate common-law doctrine of fair and equitable apportionment should prevail and be applied," and that any allocation to New York should not constitute a prior appropriation but

should be chargeable against their fair and equitable share in said waters" (SM 8-9).*

He then pointed out that although attempts of the Delaware Basin States between 1936 and 1951 to arrive at a compact had failed, agreement was nevertheless reached in the course of the current litigation which could properly be "buttressed by an adjudication on the part of this Court" (SM 36). It was thus noted that in opposing an additional diversion of 360 mgd to meet New York's present needs, Pennsylvania and New Jersey urged that the waters of the Delaware River "must be fairly and equitably apportioned between the four bordering States in accordance with their present and reasonable future

*The Special Master's report and the 12-volume record of the proceedings were admitted herein as Ex. AZ. Pages of his report similarly follow the letters SM.

needs" (SM 21-22). New York having agreed, however, to amend its petition by incorporating "a new release formula known as the 'Montague formula'," New Jersey consented thereto, and "requested an adjudication of its right to divert 100 mgd without compensating releases from the Delaware River watershed, as a part of its fair and equitable share of the waters of the Delaware River" (SM 22, 25).

The Special Master further reported that upon agreement between New Jersey and Pennsylvania to share the cost of a dam to impound Delaware River waters at Wallpack Bend, Pa., which "will yield 756 mgd for water supply purposes, of which Pennsylvania will take at least 70% or 529 mgd and New Jersey may take 30% or 22⅝ mgd under their negotiated settlement," Pennsylvania similarly

withdrew objection to the amended decree sought by New York - provided there "be no estoppel against her at any time in the future notwithstanding any expenditures made by any party" (SM 49, 64-66). In enacting the prerequisite legislation to assure the Wallpack Bend project, the New Jersey Legislature declared that - as a result of the City's oversize reservoirs for compensating releases during the dry season, "minimum flows of the river will be effectively increased" above its natural flow; "New York's expenditure for storage capacity to provide compensation flow alone will cost them approximately $30,000,000"; additional capacity for supplementary releases will also be provided by the City; and, in consequence thereof, "the beneficial effects of improved river regulation and of supplementary releases on sanitation, fish life, recreation

and industrial water supply are materially greater than * * * any possible detrimental effect of the diversion of high water flows by the City of New York" (N.J. Laws of 1953, c. 443 [R.S. Cum. Supp. 32: 20-24 et seq]).

(3)

In making his final recommendations, the Special Master noted the unchallenged proof that the "Delaware River and its tributaries produce more than enough water to meet the present additional requirements of the citizens of New Jersey, Pennsylvania and Delaware, if the surplus waters of winter and spring are stored for later release" (SM 30-31). He then pointed out that the average long-term runoff in the Delaware watershed above Trenton was 7640 mgd, 36% of which (2780 mgd) "is derived from the New York watershed" - so that

increasing the 440 mgd previously allotted New York to 800 mgd, means that "about 29% of New York's total runoff in the Delaware watershed" is to be thus apportioned, or 10.4% of the total runoff (7640 mgd) in the "entire watershed above Trenton" (SM 63-64).

It was similarly noted that the 178 billion gallon (BG) combined storage capacity of the two reservoirs erected on the East Branch and Neversink River would be increased to 269 BG upon addition thereto of the proposed reservoir (Cannonsville) on the West Branch (ibid). Since the "minimum or permanent volume of storage required for releases" was 85 BG, the Special Master pointed out that New York would therefore be required to devote a minimum of "32% of the City's Delaware storage, to the regulation of the lower river" (ibid). And this would maintain

the river's low flow at Montague (near Port Jervis) at 1750 cfs (1131 mgd) - i.e., at "an increase of 250% in the observed minimum flow" at Montague (322 mgd) prior to the City's release capacity (SM 82). As the Special Master further explained, in addition to thus providing storage capacity "for beneficial river regulation," the Montague formula required supplementary releases of up to 70 BG over and above the basic permanent releases of 85 BG annually, the supplementary releases required being dependent upon the difference between City consumption and total yield of its entire water supply system, only 45% of which derived from the Delaware watershed (SM 82, 74). The beneficial effects of that excess storage capacity in abating salt water intrusion from the ocean were also noted, and appointment of a River Master recommended (SM 84-86, 116).

(4)

The Special Master's Report was "in all respects approved and confirmed" and his recommendations embodied in a consent decree (347 U.S. 995, 996 [1954]). The 1931 decree was thereby amended and New York "enjoined from diverting water from the Delaware River or its tributaries except to the extent herein authorized and upon the terms and conditions herein provided." A total diversion of 800 mgd was authorized upon completion of the "proposed dam and reservoir at Cannonsville on the West Branch of the Delaware River," diversions and releases to be under the "direction of the River Master, hereinafter appointed and shall be subject to the following conditions and obligations" (ibid.). The first of those conditions and obligations was for "Compensating Releases - The Montague Formula"

(347 U.S. at 997).* Pursuant thereto, the City was required "to maintain a minimum basic rate of flow at the gauging station of the U.S. Geological Survey (USGS) at Montague" of 1750 cfs (1131 mgd) by releasing water "from one or more of its storage reservoirs in the upper Delaware watershed" - compliance by the City with the directions of the River Master being "full compliance" with that mandated release regime (347 U.S. at 997-8). In addition, whenever the safe yield of the City's total water supply from its three watersheds (Croton, Catskill, Delaware), fixed at "not less than 1665 mgd," exceeded consumption, 83% of such excess but "not to exceed 70 billion gallons"

*Montague, N.J. is 2 miles from Tri-State Rock (Port Jervis, N.Y.) where the 3 states of Pennsylvania, New Jersey and New York converge.

was to be released "to maintain a flow at Montague" of up to 2650 cfs (1,722 mgd) [347 U.S. at 998-9]. And a sewage treatment plant was to be maintained at Port Jervis (347 U.S. at p. 1001).

The amended decree also authorized New Jersey to "divert outside the Delaware River watershed, from the Delaware River or its tributaries in New Jersey, without compensating releases, the equivalent of 100 mgd" - on condition that New Jersey not repeal its L. 1953, c. 443 (ante, p. 16) and join Pennsylvania in requesting Congressional approval of their Wallpack Bend project (347 U.S. at p. 1001).* The Chief Hydraulic Engineer of the USGS was desig-

*In October of 1962, Congress authorized construction of Tocks Island Lake Project, embracing Wallpack Bend (16 U.S.C. §460 et seq.; Flood Control Act of 1962, Pub. Law 87-874).

nated as River Master to administer provisions of the decree "relating to yields, diversions and releases"; adjust daily releases to maintain the prescribed flow at Montague; report annually to the Court, etc. (347 U.S. at pp. 1002-3). The decree further provided that no diversion authorized thereby "shall constitute a prior appropriation" or an apportionment impervious to future modification - failure to file objections constituting no waiver "notwithstanding any action taken by any party under the terms of this decree" (347 U.S. at pp. 1004-5).

APPENDIX III

THE 1961 COMPACT.

Seven years after entry of this Court's amended decree, the four Delaware Basin States entered into a compact creating the Delaware River Basin Commission (DRBC) composed of the Governor of each State and "one commissioner to be appointed by the President of the United States."*

As stated therein, "the purposes of this compact are to promote interstate comity; to remove causes of present and future controversy; to make secure and protect present developments within the states; to encourage and provide for the planning, conservation, utilization, de-

*Congressional approval is set forth in Pub. Laws of 1961, c. 87-328, 75 Stat. 688; see also, N.J.S.A. 32: 11D-1, et seq; 7 Del. Code Ann. §6501 et seq.; N.Y. Env. Conserv. Law, §21-0701 et seq. (L. 1961, c. 148, as amended by L. 1970, c. 262); 32 Penn. St. § 815.101 et seq.

velopment, management and control of the water resources of the basin; to provide for cooperative planning and action by the signatory parties with respect to such water resources" (17 1/2 McKinney's N.Y. Laws, Env. Conserv. Law, §21-0701, par. 1.3[e]). To effectuate long-range planning for the basin, the DRBC was to establish a "comprehensive multi-purpose plan" to provide for effective flood control, conservation, development of recreational facilities in relation to reservoirs, lakes and streams, propagation of fish and game, control movement of salt water upstream, and was to "adopt and promote uniform and coordinated policies for water conservation, control, use and management" (ibid., art. 3, par. 3.1).

The DRBC is empowered "in accordance with the doctrine of equitable apportion-

ment, to allocate the waters of the basin to and among the states signatory" - but it may not "impair, diminish or otherwise adversely affect the diversions, compensating releases, rights, conditions, obligations and provisions" of the Supreme Court's Amended Decree except by "unanimous consent of the Commission" during an emergency (Par. 3.3). The signatory States also agreed not to seek any modification of the Amended Decree that would alter the diversions or releases specified therein; and, "except upon the consent of all the parties to said decree," the DRBC was to exercise no jurisdiction over the "withdrawal, diversion or releases" there specified (Pars. 3.4, 3.5).*

*As reported by the DRBC, in 1978 "Congress put the Tocks Island reach of the Delaware in the National Wild and Scenic Rivers system," with the result that the Tocks Island project was effectively "shelved." However,

(footnote cont'd. on next page)

The Commission is accorded wide powers to acquire and control facilities for water storage and release, to regulate the river and its tributaries, "control future pollution and abate existing pollution," acquire and operate flood control facilities, develop hydroelectric power, regulate and operate facilities for "improvement of fish and wild life habitats," etc. (Pars. 4.1-4.3, 5.2, 5.3, 6.1, 8.1, 8.3[b], 8.4, 9.1-9.5, 10.2-10.4, 14.14). The compact is not to be construed as affecting or interfering with the law of each State "relating to riparian rights"; was expressly made subject to amendment; and its term fixed at 100 years (Pars. 1.6, 14.19, 14.20).

* (footnote cont'd. from previous page)

at the Commission's request, the parties entered "into serious good faith discussions to establish the arrangements, procedures and criteria for management of the waters of the Delaware Basin consistent with the compact." DRBC Annual Report 1978, pp. 4-5.